STATE OF MICHIGAN
IN THE SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN,	**MSC No.:**
Plaintiff-Appellee,	**COA No.: 334098**
v.	**Trial Ct. No.: 2015 – 000156 - FH**
SHAE LYNN MULLINS,	**Defendant-Appellant's Application for Leave to Appeal**
Defendant-Appellant.	

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DEFENDANT- APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Michigan Court Rules

Michigan Supreme Court Cases

Michigan Court of Appeals Cases

Michigan Rules of Evidence

Supreme Court of the United States Cases

Cases

INDEX OF EXHIBITS

STATEMENT OF APPELLATE JURISDICTION

Defendant-Appellant was convicted by jury verdict following trial in the Berrien County Circuit Court on April 18, 2016. Defendant-Appellant was sentenced on June 20, 2016. Defendant-Appellant timely filed her claim of appeal with the Court of Appeals on August 1, 2016. The Court of Appeals issued a published opinion affirming Defendant-Appellant's convictions on November 30, 2017. This Court has jurisdiction to review this application for leave to appeal pursuant to MCR 7.303(B)(1), MCR 7.305(C)(2)(a), and MCL 770.3(6).

STATEMENT OF QUESTIONS PRESENTED

I. WHETHER THE TRIAL COURT ERRED IN ADMITTING OTHER ACTS EVIDENCE PURSUANT TO MRE 404(b) REGARDING PRIOR CHILD PROTECTIVE SERVICES INVESTIGATIONS INVOLVING DEFENDANT AND THAT DEFENDANT WOULD NOT BENEFIT FROM PARENTING PROGRAMMING WHEN THE PROSECUTOR OFFERED THE EVIDENCE FOR A PROPENSITY PURPOSE TO PROVE THAT DEFENDANT WAS A BAD PARENT OR HAD A CHARACTER FOR LYING TO CHILD PROTECTIVE SERVICES?

Defendant-Appellant Answers: Yes.
Plaintiff-Appellee Answers: No.
The Trial Court Answered: No.
The Court of Appeals Answered: No.

II. WHETHER A PERSON MAY BE FOUND GUILTY OF MAKING A FALSE REPORT OF CHILD ABUSE OR NEGLECT WHEN THEY DO NOT PERSONALLY MAKE A REPORT AND THEY DO NOT PROVIDE ANY STATEMENTS TO A MANDATORY REPORTER?

Defendant-Appellant Answers: No.
Plaintiff-Appellee Answers: Yes.
The Trial Court Answered: Yes.
The Court of Appeals Answered: Yes.

STATEMENT OF FACTS

I. PROCEDURAL HISTORY

Defendant-Appellant Shae Lynn Mullins ("Mullins") was charged in a two-count complaint that was filed in the Berrien County Trial Court[1] on or about January 14, 2015. Exhibit A – Register of Actions. Mullins was charged with one count of making false report of child abuse or neglect that would have constituted the felony of Criminal Sexual Conduct to the Department of Health and Human Services ("DHHS"),[2] contrary to MCL 722.633(5)(b), and one count of contributing to the neglect or delinquency of a minor child, contrary to MCL 750.145. These crimes allegedly occurred on November 18, 2013 in St. Joseph Township, Berrien County, Michigan. Exhibit B – Complaint. The allegations against Mullins that formed the basis of the charges are that she told her daughter PD[3] to tell an adult a statement to the effect that PD's father "has hurt her and hurts her privates."

Mullins was arraigned on January 23, 2015. Ex. A. A preliminary examination was held before the Honorable Donna B. Howard on March 3, 2015. Ex. A. Following the conclusion of the preliminary examination, Judge Howard took the matter under advisement to issue a written opinion on the People's Motion for Bindover on the felony charge. On March 13, 2015, Judge Howard issued a Preliminary Examination Opinion and Order denying the People's Motion for Bindover by finding that Mullins's alleged behavior did not fall under the meaning of MCL 722.633(5)(b) because Mullins did not herself or through her child actually make a false report to DHHS. Exhibit C – Preliminary Examination Opinion and Order at 8-9. Judge Howard compared MCL 722.633(5)(b), which establishes the offense filing a false report of child abuse or neglect that would constitute a felony,

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[1] Berrien County has organized its district court and circuit court into one trial court of concurrent jurisdiction pursuant to local administrative order and approval of the Michigan Supreme Court.

[2] The record is inconsistent and often calls the Department of Health and Human Services ("DHHS") by its previous name, the Department of Human Services ("DHS"). This Application refers to the department by its current name—"DHHS"—throughout.

[3] PD is still a minor child, so she is referred to by her initials throughout this Application.

with MCL 750.411a, which establishes the offense of filing a false police report. Ex. C at 7-8. Judge Howard noted that MCL 750.411a establishes that not only is making a false report a criminal act but it also criminalizes the action of "intentionally caus[ing] a false report of the commission of a crime to be made." Ex. C at 7. Judge Howard noted that this additional language concerning "intentionally causing a false report . . . to be made" is absent from MCL 722.633(5)(b). Ex. C at 7-8. Therefore, Judge Howard found that there was no evidence that Mullins had made a false report to DHHS and dismissed the offense without prejudice. Ex. C at 9.

The People filed a Motion for Reconsideration, which was denied. Ex. A at 2-3. On April 17, 2015, the People filed an Application for Leave to Appeal to the Circuit Court. Ex. A at 3. The Honorable Angela M. Pasula was assigned to review the Application for Leave to Appeal. Ex. A at 3. Judge Pasula granted the Application for Leave to Appeal on June 9, 2015. Ex. A at 4. Oral argument on the appeal was held on August 7, 2015 before Judge Pasula, who took the matter under advisement to issue a written opinion and order. Ex. A at 4. On August 31, 2015, Judge Pasula issued an Opinion and Order Reversing Decision of the Trial Court Refusing to Bind Defendant Over for Trial. Exhibit D – Opinion and Order of Judge Pasula. As a result of Judge Pasula's Opinion and Order, the felony charge was reinstated, and Judge Howard bound the matter over for trial following remand.

On November 19, 2015, the People served their Notice of Intent to Introduce Evidence of Prior Acts Pursuant to MRE 404(b). Exhibit E – People's MRE 404(b) Notice. In their Notice, the People sought to introduce other acts evidence pursuant to MRE 404(b) concerning *inter alia* Mullins's prior involvement with Child Protective Services ("CPS"). Ex. E at 2-3. On December 10, 2015, Mullins filed her Objections to 404(b) Evidence. Exhibit F – Defendant's Objections to 404(b) Evidence. On January 26, 2016, Judge Howard issued an Opinion and Order Regarding Prior Acts Evidence Pursuant to MRE 404(b). Exhibit G – Opinion and Order Regarding 404(b) Evidence. In her Opinion and Order, Judge Howard held as admissible "'other acts' involving [Mullins] initiating

reports to CPS." Ex. G at 6. Judge Howard held the remaining evidence that the People sought to introduce pursuant to MRE 404(b) to be inadmissible at trial. Ex. G at 5-7. Notably, Judge Howard's Opinion and Order does not rule that discussion of any prior abuse or neglect petition involving Mullins would be admissible at trial pursuant to MRE 404(b). *See* Ex. G.

Jury selection and the trial began on April 12, 2016. Ex. A at 6. Berrien County Assistant Prosecuting Attorney Steven P. Pierangeli (P67320) (hereinafter "Mr. Pierangeli") represented the People throughout the trial. Attorney Michael J. Cronkright (P52671) appeared on behalf of Mullins. During jury selection, Mr. Pierangeli referenced the filing of abuse and neglect petitions on at least four different occasions. Exhibit H – Trial Transcript Vol. 1 at 83:6-14, 19-23, 84:22-25, 187:11-16. Jury selection and openings were completed on April 12, 2016.

On April 13, 2016, the People began presentation of their case-in-chief. The People called the following witnesses: PD, Linda Fish, Jody Maher, and Kevin Proshwitz. Exhibit I – Trial Transcript Vol. 2 at 2.

On April 14, 2016, the People called the following witnesses: Louis Dominion, Cindy Wallis, Doug Kill, and Robin Zollar. Exhibit J – Trial Transcript Vol. 3 at 2. Following the testimony of Robin Zollar, the People rested. Ex. J at 233:5-7. Mullins then began presentation of her case-in-chief by calling Jon Klepper and Jordan Mullins as witnesses. Ex. J at 2. Without objection from the People, Mullins made a motion for directed verdict following the testimony of Jordan Mullins, which Judge Howard denied. Ex. J at 290-94.

Trial continued on April 15, 2016 with the testimony of Brooke Rospierski and Mullins. Exhibit K – Trial Transcript Vol. 4 at 2. Following the conclusion of Mullins's testimony, Mullins rested. Ex. K at 261:8.

The trial concluded on April 18, 2016. Exhibit L – Trial Transcript Vol. 5. The People re-called Kevin Proshwitz as a rebuttal witness, and both parties presented closing arguments. Ex. L at

2. Mr. Pierangeli argued extensively during his closing argument that Mullins had purportedly made false reports of sexual abuse to get CPS involved in the past and that she has a propensity to file false reports to CPS. Ex. L at 90:11-92:11. Following jury instructions and deliberations, the jury returned a verdict of guilty on both counts. Ex. L at 118:18-21.

Mullins was sentenced on June 20, 2016 to 7 days jail and was placed on probation for 2 years. Exhibit M – Judgment of Sentence. Mullins timely filed her claim of appeal with the Court of Appeals on August 1, 2016. On November 30, 2017, the Court of Appeals issued a published opinion affirming defendant's convictions. Exhibit N – Opinion of the Court of Appeals. This timely application for leave to appeal to the Michigan Supreme Court follows.

II. FACTUAL HISTORY

A. Background of the Parties

This case is an unfortunate tug-of-war between two parents and their daughter. PD, DOB 1-5-2006, is the biological daughter of Mullins and Louis Dominion ("Mr. Dominion"). Ex. K at 94:6-17. Mullins and Mr. Dominion have been engaged in virtually constant litigation concerning PD since approximately 2008. Ex. K at 96:1-7. As such, the majority of the facts are highly disputed among the parties. A considerable amount of the testimony at trial was dedicated to Mullins and Mr. Dominion's history as it concerns PD. Therefore, some brief background is necessary.

Mullins was PD's primary caregiver from the time of her birth until 2008, when Mr. Dominion established parentage and custody through legal proceedings. Ex. K at 97:20-98:5. At that time, Mr. Dominion began with some supervised parenting time with PD, which gradually transitioned to unsupervised. Ex. K at 99:12-100:6.

Following Mr. Dominion's first weekend of unsupervised parenting time with PD in February 2008, Mullins testified that she observed some distressing behaviors out of PD and also observed redness and swelling on PD's vaginal area. Ex. K at 100:14-17, 103:14-18. In response, Mullins took

PD to receive medical attention. Ex. K at 104:19-24. Due to the nature of PD's symptoms, CPS and the Michigan State Police were called to investigate by PD's treating physician or staff. Ex. K at 107:13-17. Mr. Dominion's parenting time with PD was suspended or otherwise not exercised pending the investigation. Ex. K at 113:17-20. During the investigation, CPS referred Mullins to take PD to Doctor Gusthurst at Bronson Hospital in Kalamazoo, Michigan. Ex. K at 119:10-22. The February 2008 case was eventually closed, and Mr. Dominion's unsupervised parenting time with PD resumed. Ex. J at 86:15-20, Ex. K at 114:5-6.

In May 2008, following Mr. Dominion's exercise of weekend parenting time with PD, Mullins again observed the same redness and swelling in PD's vaginal area. Ex. K at 115:1-20, 116:18-19. In response to these observations, Mullins took PD to Bronson Hospital to see Dr. Gusthurst, who she believed to be a specialist. Ex. K at 120:18-121:1, 204:23-25. Again, medical personnel contacted CPS and/or the Michigan State Police due to the nature of PD's symptoms. Ex. K at 121:5-23. Mr. Dominion's parenting time with PD was suspended or otherwise not exercised for a period of time while this matter was investigated. Ex. K at 122:6-7. Mullins testified that her goal was to protect and prevent PD from being hurt. Ex. K at 126:9-14. Ultimately, CPS and Michigan State Police closed their investigations of the May 2008 matter. Ex. J at 87:7-11.

In September 2008, Mullins again observed redness and swelling in PD's vaginal area after Mr. Dominion had exercised parenting time. Ex. K at 131:10-23. Mullins took PD for medical treatment, and CPS and Michigan State Police got involved for a third time. Ex. K at 131:16-23.

Following this third incident in 2008, DHHS filed an abuse and neglect petition to take jurisdiction over PD.[4] During the trial, Mr. Pierangeli elicited extensive testimony regarding this petition involving Mullins as a respondent and another supposed petition concerning Mullins as a respondent, including testimony to suggest that Mullins would not benefit from parenting

[4] This matter was litigated heavily and even reached this Court.

programming from DHHS. Ex. I at 261:3-7, 281:10-287:24; Ex. J at 18:23-19:12, 90:6-92:24, 222:17-19, Ex. K at 133:10-134:16, 214:16-220:23. Following this third incident in 2008, Mullins and Mr. Dominion's custodial relationship with PD changed such that Mr. Dominion had primary physical custody and Mullins had parenting time every other weekend and week on/week off in the summer. Ex. K at 135:13-21.

The parties proceeded on this parenting time and physical custody arrangement until November 18, 2013. These events form the necessary background to give context to the events alleged in Complaint.

B. Events of November 18, 2013 and Aftermath

The criminal charges against Mullins in this matter stem from the events surrounding Monday, November 18, 2013. Ex. B. Mullins had parenting time with PD beginning on Friday, November 15, 2013 until Monday, November 18, 2013, when Mullins dropped PD off at school. Ex. K at 140:21-145:25. At this time, PD was attending Lake Michigan Catholic School in St. Joseph Township, Berrien County, Michigan for 2nd grade. Ex. I at 18:20-23. Mullins lived in the Battle Creek, Michigan area at the time and would drive PD to school on Monday mornings. Ex. K at 154:7-12.

Mullins and her boyfriend, Jon Klepper ("Klepper"), drove PD to school this morning, who both testified that PD slept the entire drive. Ex. J at 242:12-244:25, Ex. K at 153:18-154:6. They arrived at the school just as class was starting, and Mullins took PD into the school to see her to her classroom. Ex. K at 154:13-156:1. Mullins left the school shortly thereafter. Ex. K at 157:15-160:15.

It is undisputed that PD had a private conversation with her teacher, Linda Fish ("Ms. Fish"), at approximately 11:15 a.m. Ex. I at 190:24-195:1. It is also undisputed that PD told Ms. Fish, "Lou Dominion hurts me and has hurt my private parts." Ex. I at 193:24-194:8. In response to that statement, Ms. Fish asked PD if anyone had told PD to say that to her and PD responded by saying, "God." Ex. I at 196:8-13. Ms. Fish followed up by asking PD whether she had been "spanked," and

PD responded by saying, "yes." Ex. I at 197:11-14. It is also undisputed that in response to PD's statements, Ms. Fish reported these statements to her principal, Jody Maher, who made a report to DHHS, which opened a CPS investigation into the matter. Ex. I at 198:20-199:1, 234:14-235:8.

Kevin Proshwitz ("Mr. Proshwitz"), an investigator from CPS, was assigned to the file and made contact with Mr. Dominion later that day and requested that Mr. Dominion return home immediately. Ex. I at 251:1-16. On the drive back to Mr. Dominion's home, Mr. Dominion was visibly upset and asked PD "what your mom (Mullins) promised you this time." Ex. J at 27:9-10, Ex. I at 98:9-11. Upon arriving at Mr. Dominion's home, Mr. Dominion and PD were met by Mr. Proshwitz and his assistant from DHHS. Ex. I at 252:13-16. After meeting with Mr. Dominion, Mr. Proshwitz met with PD in her bedroom at Mr. Dominion's suggestion. Ex. I at 254:19-24. Following the interview and the investigation, Mr. Proshwitz testified that he was concerned that Mullins had told PD to lie—an allegation that was specifically suggested to PD by Mr. Dominion just before PD's conversation with Mr. Proshwitz. Ex. I at 261:2. Notably, during Mr. Proshwitz asked PD a leading question as to whether anyone had told PD to tell a lie. Ex. L at 7:13-16. PD's response to this question was that Mullins had told her to lie. Ex. L at 24-25.

PD testified at trial, inconsistently at times, that Mullins had told her on two to three separate occasions over the course of the weekend preceding and Monday, November 18, 2013 that if PD said bad things about Mr. Dominion that they would get to spend more time together. Ex. I at 16:15-17. PD testified that she wanted to spend more time with Mullins. Ex. I at 17:19-11. PD testified that her mom had told her what to say about Mr. Dominion on two separate occasions—once in the car on the drive to school on the morning of November 18, 2013 and the night before in Mullins's bedroom. Ex. I at 23:1-6. PD denied any conversation with Mullins occurring in the coat room at the school, contrary to her testimony at the preliminary examination, but she changed her story to include a third instance after she was impeached with her prior testimony at the preliminary examination. Ex. I at

151:14-153:21. PD also testified that private parts were "[b]oobs, butt, and your other one." Ex. I at 173:15. PD also testified that Mr. Dominion had spanked her in the past. Ex. I at 104:25-105:2.

Mullins and Klepper denied that any conversations with PD on the drive to school in their testimony, and Mullins also repeatedly denied that she ever told PD to tell anyone any allegations concerning Mr. Dominion. Ex. J at 244:12-25, Ex. K at 168:15-24.

On November 21, 2013, PD was forensically interviewed by Brooke Rospierski ("Ms. Rospierski") at the Children's Assessment Center. During this interview, Ms. Rospierski asked PD why she decided to tell Ms. Fish the allegations concerning Mr. Dominion, to which PD responded, "Because I knew I could and it was okay to." Ex. K at 65:20-25. At no point during the forensic interview did PD tell Ms. Rospierski that Mullins had told her to lie. Ex. K at 68:1-6.

Following closing arguments and deliberations, the jury returned a verdict of guilty on both counts. Mullins's timely appeal to the Court of Appeals followed. On November 30, 2017, the Court of Appeals issued a published opinion affirming Mullins's convictions. Ex. N. This timely application for leave to appeal follows.

ARGUMENT

This Honorable Court should grant this application for leave to appeal and vacate Defendant-Appellant's convictions and reverse and remand this matter for a new trial because the published opinion of Court of Appeals is contrary to well-established Michigan Supreme Court jurisprudence on MRE 404(b). As the Court recently reaffirmed in *People v Denson*, when it comes to MRE 404(b) evidence: "The risk is severe that the jury 'will use the evidence precisely for the purpose that it may not be considered, that is, as suggesting that the defendant is a bad person, a convicted criminal, and that if he 'did it before he probably did it again.'" *People v Denson,* 500 Mich 385, 410 (2017), quoting *People v Crawford*, 458 Mich 376, 398 (1998). In this matter, the Court of Appeals mischaracterized Defendant-Appellant's arguments in an attempt to avoid confronting the primary issue addressed in her appeal—namely that the admission of the MRE 404(b) evidence was erroneous because the prosecutor did not offer the evidence for a proper non-propensity purpose. The fact that the prosecutor did not offer the evidence for a proper non-propensity purpose is well-supported in the record by reviewing the prosecutor's comments made during closing argument during which the prosecutor argued on at least 6 separate occasions to the effect that Defendant-Appellant had committed bad acts before, so she's done it again in this case. This is precisely the inference that MRE 404(b) prohibits.

As a result, the published opinion of the Court of Appeals affirming Defendant-Appellant's convictions conflicts with this Court's MRE 404(b) decisions, including, most notably, *People v Denson*, 500 Mich 385 (2017). MCR 7.305(B)(5)(b). Moreover, as the opinion of the Court of Appeals is published in this matter, it carries precedential value, MCR 7.215(C)(2), and this case, therefore, "involves a legal principle of major significance to the state's jurisprudence." MCR 7.305(B)(3).

This Honorable Court should grant Defendant-Appellant's application for leave to appeal, vacate her convictions, and remand this matter for a new trial because (1) the trial court erred in

allowing the admission of other acts evidence pursuant to MRE 404(b) regarding prior CPS investigations involving Mullins because it unduly influenced the jury into believing that Mullins was a bad mother or had a propensity for lying and (2) the crime of filing a false report of child abuse or neglect is only applicable to those who have a mandatory duty to report abuse or neglect by the plain language of the statute, MCL 722.633(5). If Mullins prevails on either of these issues, her convictions must be vacated and this matter must be reversed and remanded for a new trial.

I. THE TRIAL COURT ERRED IN ADMITTING OTHER ACTS EVIDENCE PURSUANT TO MRE 404(b) REGARDING PRIOR CHILD PROTECTIVE SERVICES REPORTS BECAUSE THE EVIDENCE WAS NOT OFFERED FOR A PROPER NON-PROPENSITY PURPOSE.

Prior to trial, the People filed a notice of intent to introduce other acts evidence pursuant to MRE 404(b). Ex. E. Mullins filed an objection to the introduction of any MRE 404(b) evidence. Ex. F. Therefore, this issue is preserved for appellate review.

The trial court ultimately ruled the following other acts evidence to be admissible at trial: "evidence of the Defendant's prior allegations or complaints of sexual abuse of the daughter of Mr. Dominion to CPS, the resulting CPS investigation, resulting parenting time suspension during the CPS investigation, and ultimate disposition of the investigation." Ex. G at 6. A trial court's decision regarding admissibility of evidence is reviewed for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383 (1998), citing *People v Babcock*, 448 Mich 261 (1995). "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes or makes an error of law." *People v Swain*, 288 Mich App 609, 628-29 (2010). As Chief Justice Markman noted in *People v Babcock*:

> At its core, an abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome. When the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court's judgment. An abuse of discretion occurs, however, when the trial court chooses an outcome falling outside this principled range of outcomes.

People v Babcock, 469 Mich 247, 269 (2003) (citations omitted). Moreover, while a trial court's decision to admit evidence is reviewed for an abuse of discretion, "whether a rule or statute precludes admission of evidence is a preliminary question of law that [is] review[ed] de novo." *Denson*, 500 Mich at 396.

In the instant matter, the trial court erred as a matter of law by ruling that the other acts evidence was admissible under MRE 404(b). The trial court abused its discretion in admitting the People's other acts evidence pursuant to MRE 404(b) because the evidence was not relevant under MRE 401 and MRE 402. In addition, the trial court also erred in admitting the evidence under MRE 404(b) because it was not offered for an admissible purpose. Instead, the People offered the other acts evidence to prove that Mullins was of bad character or had a propensity for filing false CPS reports. Moreover, the trial court also abused its discretion when it allowed admission of evidence regarding prior abuse and neglect petitions pursuant to MRE 404(b) when the People did not provide the requisite notice of under MRE 404(b)(2). The evidence regarding any prior abuse and neglect petitions involving Mullins was not relevant under MRE 401 and should have been excluded pursuant to MRE 402. Furthermore, the other acts evidence was highly prejudicial and had minimal, if any, probative value regarding the actual issues in this matter and should have been excluded pursuant to MRE 403. The cumulative effect of the admission of this evidence was not harmless error due to the extremely prejudicial nature of the evidence and requires vacation of Mullins's convictions and reversal and remand for a new trial. *Crawford*, 458 Mich at 399-400.

A. The Trial Court Erred in Admitting the Other Acts Evidence Because It Was Not Relevant.

The other acts evidence that the People introduced at trial was highly contested as to its truthfulness and was the subject of extensive prior litigation. At trial, the People introduced evidence that PD, Mullins, and Mr. Dominion had been the subject of three prior investigations by CPS. Ex. J at 10-20, 77-82, 84-92. There was no testimony presented that Mullins ever directly contacted CPS, and each of the three prior investigations stemmed from Mullins taking PD to a physician to be

examined for redness and swelling of PD's vaginal area. Ex. J at 10-20, 77-82, 84-92. The People did not introduce any evidence regarding how the CPS investigations actually got started, i.e. that Mullins took PD to be examined by a physician for observed redness and swelling to PD's vaginal area and that a physician had made the referral to CPS. Instead, the People attempted to frame the issue by showing that Mullins essentially had a character for getting CPS involved on supposedly false pretenses. Importantly, none of these prior CPS investigations involved any supposed statement by PD at the urging of Mullins. All of the prior CPS investigations occurred in 2008, when PD was less than 3 years old. The prior CPS investigations were all initiated by physicians following medical examination of PD. Ex. K at 103-107, 115-122, 127-131. Medical professionals discharging their statutory obligation to report suspected child abuse or child neglect is not probative of a parent purportedly telling a minor child to lie about sexual abuse. MCL 722.623(1)(a). A parent taking their child to seek medical care for observed redness or irritation on their genitalia does not make it any more or less probable that that parent would encourage their child to lie about sexual abuse. MRE 401.

Moreover, the People also introduced evidence that Mullins had been the subject of at least two petitions for abuse and neglect in the family court. None of the prior investigations involved Mullins instructing PD to give any statement or even any situation where Mullins gave any affirmatively false statements to CPS. Therefore, these prior events were not relevant under MRE 401 and should have been excluded under MRE 402.

MRE 401 states that relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. In *Aldrich*, the Court of Appeals stated that "Under this broad definition, evidence is admissible if it is helpful in throwing light on any material point."

People v Aldrich, 246 Mich App 101, 113-14 (2001); citing *People v Kozlow*, 38 Mich App 517, 524-25 (1972).

However, relevant evidence must be material and have probative value. *Crawford*, 458 Mich at 388. Materiality is defined as "the requirement that the proffered evidence be related to 'any fact that is of consequence' to the action." *Id.*, quoting MRE 401. Probative value is defined as whether the "evidence tends 'to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" *Id.* at 389. The proponent of the evidence has the initial burden of establishing the relevancy of the evidence. *Id.* at 385. Under MRE 402, "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Michigan, these rules, or other rules adopted by the Supreme Court. Evidence which is not relevant is not admissible." MRE 402.

In this matter, the introduction of the other acts evidence only served to prejudice the jury. The other acts evidence did not make any element of the charged offenses "more probable or less probable than it would be without the evidence." *Crawford*, 458 Mich at 389. The only link between the other acts evidence is that they involved the same main players—Mullins, PD, Mr. Dominion, and CPS. It is unclear how Mullins's decision to seek medical treatment for PD—rightly or wrongly—in 2008 somehow makes it more probable or less that she would coach or encourage PD to lie about sexual abuse in 2013. Moreover, the other acts evidence concerning the prior petitions of abuse and neglect against Mullins did not provide any connection with any allegation that Mullins was purportedly instructing PD to lie or any similar type of allegation. Perhaps worst of all was the testimony of Kevin Proshwitz that the People introduced that suggested that Mullins would not benefit from any parenting programming from DHHS. Ex. I at 282-287. It is difficult to conceive of how a statement regarding the perceived lack of benefit or utility of parenting programming for Mullins would have any probative value to any fact of consequence in this case. Rather, the sum total

effect of all of this evidence was to show Mullins's bad character or that she was a bad mother to prejudice the jury. In this context, the evidence was not relevant under MRE 401 and inadmissible under MRE 402. *See also* MRE 403. Thus, the trial court abused its discretion when it allowed the jury to hear it.

B. The People's Other Acts Evidence Was Also Inadmissible Under MRE 404(b) Because It Was Offered and Argued Extensively by the People for an Impermissible Purpose—to Prove that Mullins had Bad Character.

The Michigan Rule of Evidence concerning the inadmissibility of other acts evidence is MRE 404, specifically MRE 404(b). MRE 404(b) states that:

> (1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.
>
> (2) The prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial and the rationale, whether or not mentioned in subparagraph (b)(1), for admitting the evidence. If necessary to a determination of the admissibility of the evidence under this rule, the defendant shall be required to state the theory or theories of defense, limited only by the defendant's privilege against self-incrimination.

MRE 404(b). "The character evidence prohibition is deeply rooted in our jurisprudence. Far from being a mere technicality, the rule 'reflects and gives meaning to the central precept of our system of criminal justice, the presumption of innocence.'" *Crawford*, 458 Mich at 384, quoting *United States v Daniels,* 770 F2d 1111 (DC Cir 1985).

Under MRE 404(b), a "Mechanical recitation of "knowledge, intent, absence of mistake, etc.," without explaining how the evidence relates to the recited purposes, is insufficient to justify admission under MRE 404(b)." *Crawford*, 458 Mich at 387.

In *Old Chief*, the Supreme Court of the United States discussed the rationale behind the inadmissibility of character evidence:

> The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so over persuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.

Old Chief v United States, 519 US 172, 180; 117 SCt 644 (1997); quoting *United States v Moccia*, 681 F2d 61, 63 (1st Cir 1982).

This Court recently noted that MRE 404(b) "reflects the fear that a jury will convict a defendant on the basis of his or her allegedly bad character rather than because he or she is guilty beyond a reasonable doubt of the crimes charged." *Denson*, 500 Mich at 397. To ensure the protection of a defendant's presumption of innocence, *Denson* re-iterated the standard in *People v VanderVliet*, 444 Mich 52 (1993) in determining whether other-acts evidence may be admitted:

> First, that the evidence be offered for a proper purpose under Rule 404(b); second, that it be relevant under Rule 402 as enforced through Rule 104(b); third, that the probative value of the evidence is not substantially outweighed by unfair prejudice; fourth, that the trial court may, upon request, provide a limiting instruction to the jury.

Denson, 500 Mich at 398, quoting *VanderVliet*, 444 Mich at 55.

As to the first prong, the prosecutor bears the burden of establishing that the other-acts evidence is offered for a proper noncharacter purpose. *Denson*, 500 Mich at 398-99. However, a "mechanical recitation" of a permissible purpose is insufficient; "[i]t is incumbent on a trial court to 'vigilantly weed out character evidence that is disguised as something else.'" *Id.* at 400, quoting *Crawford*, 458 Mich at 388. To determine whether the other-acts evidence is being offered for a proper purpose, "the trial court must closely scrutinize the logical relevance of the evidence." *Denson*, 500 Mich at 400.

Logical relevance is determined by reference to MRE 401 and MRE 402. *Id.* at 400-401. "Other-acts evidence is logically relevant if two components are present: materiality and probative value." *Id.* at 401. Materiality requires the evidence to be related to a fact that is of consequence to the action, and evidence is probative if it tends to make any fact of consequence more probable or less probable. *Id.* In the MRE 404(b) context, while a "prosecution might claim a permissible purpose for the evidence under MRE 404(b), the prosecution must also *explain how* the evidence is relevant to that purpose without relying on a propensity inference." *Id.* at 402.

The prosecution must establish "'some intermediate inference, other than the improper inference of character, which in turn is probative of the ultimate issues in the case." *Id.*, quoting *Crawford*, 458 Mich at 391 (internal quotation marks and alterations omitted). When "the prosecution creates a theory of relevance based on the alleged similarity between a defendant's other act and the charged offense, [this Court] require[s] a 'striking similarity' between the two acts to find the other admissible." *Denson*, 500 Mich at 403. A "general similarity between the charged and uncharged act does not, however, by itself, establish a plan, scheme, or system used to commit the acts" is insufficient. *People v Sabin*, 463 Mich 43, 64 (2000). Further, "to establish the existence of a common design or plan, the common features must indicate the existence of a plan rather than a series of similar spontaneous acts." *Id.* at 65-66; quoting, *People v Ewoldt*, 7 Cal 4th 380, 403 (Cal 1994).

The facts and circumstances of *Denson* are illustrative to the instant matter and merit considerable review. Denson was charged with assault with intent to do great bodily harm less than murder following a physical altercation. 500 Mich at 389. Denson and the alleged victim presented dramatically different accounts of the altercation with the victim testifying that he was engaged in a consensual sexual encounter with Denson's daughter and Denson testifying that he was trying to stop the victim from raping his daughter. *Id.* at 390-92. Denson testified that he was acting in self-defense and in the defense of his daughter. *Id.* at 391-92. In response, the prosecutor introduced evidence

pursuant to MRE 404(b) that defendant had been convicted in 2002 of the same offense—assault with intent to do great bodily harm less than murder. *Id.* at 392-93. The prosecutor then proceeded to dedicate a significant portion of closing argument to the MRE 404(b) evidence to argue that Denson had a propensity for violence. *Id.* at 394-95. The prosecutor argued to the jury:

> And you know, we have no reasonable doubt; no doubt that's fair that there was any kind of defense of anybody. This was just a savage beating, Mr. Denson. You lost control, just like you did in Detroit when you shot that guy. You're a bully, Mr. Denson and you're a coward. . . .
>
> * * *
>
> . . . Cause you have Mr. Denson intending to cause great bodily harm to just a boy.
>
> * * *
>
> The [2002] incident in Detroit. Hey, not a coincidence, okay. Not a coincident [sic] that the bully over a $75 . . . drug debt takes his gun, bashes the car window and shoots the guy while he's retreating into the house. No self defense in that circumstance.
>
> * * *
>
> . . . And um, this guy pounded on [Woodward] with his hands, pounded on [Woodward] with his feet, kicking [Woodward] in the face, trying to wack [sic] him with the chair, bashing a lamp over his head and breaking it. . . . Then taking photos so he would have some evidence. . . . They're not coincidences. No self defense.

Id. at 394-95. This Court vacated Denson's jury conviction and remanded the matter for a new trial on the basis that the MRE 404(b) evidence was improperly admitted. *Id.* at 414.

Turning to the facts of the case before it, the *Denson* court concluded that the other-acts evidence in that case "was not probative of anything other than defendant's allegedly bad character and propensity to commit the charged offense." *Id.* at 406. The *Denson* court found that the 2002 incident was not strikingly similar to the underlying case in part because the 2002 case did not involve a case of self-defense or defense of others, while the underlying charge did. *Id.* at 407. As a result, the *Denson* court held that the other-acts evidence "constituted mere character evidence 'masquerading' as evidence intended to rebut defendant's claims of self-defense and defense of others." *Id.* at 408.

The analysis in *Denson* is equally applicable and controlling as it relates to Mullins. The People's MRE 404(b) notice recited a purported proper purpose to prove an intended motive or scheme by Mullins to use CPS to keep Mr. Dominion out of PD's life. Ex. E at 2-3. However, this was nothing

more than a mechanical recitation. The actual intent of the People's MRE 404(b) evidence is stated plainly in the notice itself, "The facts of the present case before the court are similar to these past acts because Defendant once again accused Mr. Dominion of sexual abuse knowing that CPS would become involved and that Mr. Dominion would be prohibited from any contact with [PD] during the investigation." Ex. E at ¶ 3. Clearly, the intent of the prosecution was to show similarity in Mullins's purported alleged use of CPS in the past—a fact that was hotly contested at trial and at all prior litigation—and the allegations of the current case. As a result, the People were required under *Denson* to show a "striking similarity" between the prior CPS investigations and the current case. *Denson*, 500 Mich at 403. However, no striking similarity exists between a parent seeking medical care for their child and coaching or encouraging a child to lie about sexual abuse.

The People, through the testimony of Louis Dominion, Cindy Wallis, Doug Kill, and Robin Zollar, introduced evidence concerning three incidents in 2008 that involved CPS based on Mullins seeking medical care for PD in response to observed redness in PD's vaginal area. Ex. J at 10-20, 77-82, 84-92. The People also introduced evidence from Kevin Proshwitz to suggest that Mullins would not benefit from any parenting programming from DHHS. Ex. I at 282-287. The prior allegations that triggered CPS's involvement have key differences from the allegations underlying the instant matter. To begin, they all consist of Mullins seeking medical treatment for PD when she was only about 3 years old. None of the prior allegations involve Mullins asking PD to lie or make any type of false statements. Finally, none of the prior investigations involved Mullins making any affirmatively false statements of any kind. Mullins only sought medical treatment for PD in response to observed redness or irritation on her genitalia. The only similarities between the prior CPS investigations and the facts giving rise to the instant charges are that they involve the same main players—Mullins, PD, Mr. Dominion, and CPS. As such, the other acts evidence lacked the requisite striking similarity for it to be admissible.

Moreover, when one reviews the People's closing argument to the jury, it is clear that the People did not have a proper non-propensity purpose for introducing the other acts evidence. In his closing, Mr. Pierangeli argued that Mullins essentially had a propensity for making false reports of sexual abuse to CPS. Mr. Pierangeli stated his closing argument by immediately referencing the other acts evidence to show that Mullins had a propensity for filing false reports to CPS:

> The Defendant wants to have [PD] with her, and that's been clear from the start. The Defendant wants Lou Dominion out of [PD's] life. That's also been clear right from the start. Since Pallas has been born, through the ordeals of 2008, continued allegations of sexual abuse, up until 2013 when she's doing it all again.
>
> And now, rather than using others to call CPS and get the police involved, she's now using [PD] for it.

Ex. L at 16:17-24.

Mr. Pierangeli kept going:

> So how did she know CPS was going to be involved? So there's no doubt that this is a false report. There's no doubt that it will constitute a felony. So how did she knowingly get CPS involved?
>
> Look at her past. Look at how she operated previously. That shows you exactly how she knew CPS would get involved. It's a scheme the defendant used before to get others to do her work, just insert [PD] now, rather than doctors or medical.

Ex. L at 22:18-23:1.

Mr. Pierangeli also referenced the fact that abuse and neglect petitions had been filed and that Mullins would not benefit from parenting services:

> So he filed a petition. Now, you also heard that that petition was later withdrawn as a result of a—an agreement upstairs in the Family Court.
>
> . . .
>
> The other reason they indicated is that mom had already been through these services. "What was the point in trying to offer them again? She didn't benefit, why offer them again? It seems like it would be a waste of time. Friend of the Court is in there to supervise and make sure that everything is being supervised okay, why are we going to go through this again and need all these services? So they withdrew the petition.

Ex. L at 28:6-8, 29:3-10.

Mr. Pierangeli continued:

> But you don't need to have the doctors here. You had the prior invest—the investigation and the CPS investigation. I'm not going to bring doctors in just to testify there may have been redness. And we're not disputing, necessarily, there may have been redness.
>
> But think about the second time around when there was redness. It was the exact same presentation and she's, "Sex assault." It's her first thought and she wants to get out there.
>
> And what's important here is not the fact that she thought it was a sexual assault. She wanted others to believe there was a sexual assault. That was what was important for the defendant. She doesn't believe it was, but she wants others, and that's why she went to Doctor Gus first [sic], right away. **She wanted CPS involved again right away so that they could take the ball and run with it, just like she wanted to, just like the last time.**

Ex. L at 90:22-91:13.

And Mr. Pierangeli continued:

> And it's not necessarily what—what [PD] believed when she was telling Ms. Fish. It had nothing to do with being spanked the year before for lying. That was not what she was telling Ms. Fish. She was telling Ms. Fish, "He hurt my private parts," to make a false report of sexual abuse. That's what it was for, that's the private parts part. **And the mom used that term, because she had been doing it since 2008**.

Ex. L at 98:2-9.

Mr. Pierangeli kept going further:

> **The medical staff didn't work the last time, in 2008, so we're trying the teaching staff now, in 2013, to get CPS involved for someone to do the defendant's dirty work.**
>
> Is it a unique case? Yes, it absolutely is a unique case. But we're here now. It's not a custody case here, it's a criminal matter, because of what she did.
>
> She knew that Lou Dominion did not hurt her private parts. She knew that. She manipulated her daughter and manipulated the system to report that.

Ex. L at 100:14-22.

The People's entire case was dominated by using the other acts evidence to show that Mullins had supposedly lied to CPS in the past, and she's doing it again. This is precisely the type of evidence that is specifically prohibited by MRE 404(b). The fact that the People used the words "motive" and "scheme" during the trial is nothing more than a mere recitation to MRE 404(b)(1). The fact of the matter is that the People clearly offered the evidence and argued the evidence for propensity

purposes—to show that Mullins had bad character and that she had filed false reports in the past and was doing the same thing again.

Moreover, by the People's own admission, the other acts evidence was of a different nature than the pending charges against Mullins and therefore not strikingly similar. *Denson*, 500 Mich at 403; *see, e.g.*, Ex. L at 100:14-22. The fact that Mullins took PD to physicians for medical treatment for observed redness or irritation to PD's genitalia in 2008 is completely different than purportedly coaching or encouraging PD to lie about sexual abuse. The fact that the treating physicians actually contacted CPS corroborates the existence of redness or irritation to PD's genitalia because it would be incongruent for the physicians to contact CPS if there was no suspected evidence of child abuse or neglect. Viewing the 2008 investigations based on their outcomes, i.e. that the allegations were unsubstantiated, is anachronistic and improper. In sum, a parent seeking medical attention for her child is plainly different than coaching or encouraging a child to lie about sexual abuse to a teacher.

The differences between the 2008 events and the alleged conduct that formed the basis for the criminal charges could only serve to create the "forbidden intermediate inference of bad character that is specifically prohibited by MRE 404(b)." *Crawford*, 458 Mich at 393. Therefore, the trial court abused its discretion when it allowed admission of the other acts evidence under MRE 404(b) because the evidence was not offered for a permissible purpose and should have been precluded from admission as a matter of law.

This Court's decision in *Crawford* further supports this conclusion. In *Crawford*, the defendant was arrested in two instances involving cocaine. *Crawford*, 458 Mich at 378-81. In 1988, the defendant entered an apartment building carrying a distinct plastic bag that contained cocaine. *Id.* at 396. Shortly after entering the apartment, the defendant met with an undercover officer posing as a purchaser. *Id.* After the purchase had commenced, the Defendant was arrested. *Id.* Four years later, the Defendant was "stopped for a routine traffic violation, which ultimately led to the discovery of cocaine hidden in

the dashboard of his car." *Id.* The court concluded that the "factual relationship between the 1988 crime and the [current] charged offense was simply too remote." *Id.* Given the factual discrepancies in establishing intent to sell cocaine between the prior conviction and current charge, the prior conviction could only serve to create a "forbidden intermediate inference of bad character that is specifically prohibited by MRE 404(b)." *Id.* at 393; *see also People v Knox*, 469 Mich 502, 513 (2004) (defendant's previous displays of aggression were not similar to any physical altercation that caused his son's death). The *Crawford* Court further stated that "the defendant's prior conviction was mere character evidence masquerading as evidence of 'knowledge' and 'intent.'" *Crawford*, 458 Mich at 397.

In the instant matter, there is no striking similarity between the 2008 events involving CPS and the actual charged conduct. The People's other acts evidence involving Mullins's prior involvement with CPS with unsubstantiated allegations and evidence that Mullins would not benefit from any additional parenting programming from DHHS was only offered to prove that Mullins was a bad mother and to prejudice the jury against her. As such, the People's MRE 404(b) evidence was mere character evidence masquerading as something else. Therefore, the trial court erred in admitting the People's MRE 404(b) evidence.

C. The Other Acts Evidence Should Have Also Been Excluded Under MRE 403 Due to Its Highly Prejudicial Nature.

Even if the other acts evidence was otherwise admissible under MRE 402 and MRE 404(b), the trial court abused its discretion by not excluding the evidence under MRE 403. MRE 403 states that:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

MRE 403. In *Old Chief*, the Supreme Court of the United States stated that unfair prejudice "speaks to the capacity of some concededly relevant evidence to lure the fact finder into declaring guilt on a

ground different from proof specific to the offense charged." *Old Chief*, 519 US at 180. Further, "the problem with character evidence generally and prior bad acts evidence in particular is not that it is irrelevant, but, to the contrary, that using bad acts evidence can 'weigh too much with the jury and ... so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.'" *Crawford*, 458 Mich at 384; citing *Michelson v United States*, 335 US 469 (1948).

While most, if not all, evidence offered by a party is prejudicial to the other party, "the fear of prejudice does not generally render the evidence inadmissible." *People v Mills*, 450 Mich 61, 75, *modified on other grounds*, 450 Mich 1212 (1995). "It is only when the probative value is *substantially outweighed* by the danger of unfair prejudice that evidence is excluded." *Id.* Further, the *Mills* Court quoted the *Sclafani* Court for the proposition that "the notion of 'unfair prejudice' encompasses two concepts. First, the idea of prejudice denotes a situation in which there exists a danger that marginally probative evidence will be given undue or pre-emptive weight by the jury…. Second, the idea of unfairness embodies the further proposition that it would be inequitable to allow the proponent of the evidence to use it. Where a substantial danger of prejudice exists from the admission of particular evidence, unfairness will usually, but not invariably, exist." *Id.* at 75-76; quoting *Sclafani v Peter S Cusimo, Inc,* 130 Mich App 728, 735-36 (1983).

In *Crawford*, the Court held that the other acts evidence offered by the People was inadmissible under MRE 404(b), but also discussed the prejudicial effect of admitting other acts evidence. *Crawford*, 458 Mich at 398. The *Crawford* Court stated "To use Justice Cardozo's expression, we believe the 'reverberating clang' of the evidence that the defendant sold drugs in 1988 drowned the "weaker sound" of the other evidence properly before the jury, leaving the jury to hear only the inference that if the defendant did it before, he probably did it again." *Id.*

In this matter, the People presented extensive other acts evidence and argued repeatedly to the jury that Mullins had essentially lied to CPS before so she probably did it again. As was stated in *Crawford*, the other acts evidence "'weigh[ed] too much with the jury and . . . so overpersuade[d] them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.'" *Crawford*, 458 Mich at 384; quoting *Michelson v United States*, 335 US 469 (1948). This is especially relevant to the instant matter where the actual evidence concerning the charges against Mullins was highly contested and involved the inconsistent testimony of PD.

As previously noted, the actual probative value of the other acts evidence (excluding any propensity consideration) is minimal at best. There are enormous differences between taking your daughter to seek medical treatment and purposefully encouraging or coaching your daughter to lie about sexual abuse to her teacher. There can be no doubt that the prejudicial impact of this other acts evidence—particularly the evidence regarding prior abuse and neglect petitions—is extraordinarily high. The other acts evidence predominated the entire trial, and the People's closing argument. The trial court's refusal to exclude the evidence under MRE 403 constituted an abuse of discretion that merits reversal.

D. The Admission of the Other Acts Evidence Undermined the Reliability of the Jury's Verdict Because It Portrayed Mullins as a Bad Mother and Ruined Her Credibility.

Preserved, nonconstitutional errors, such as improper admission of MRE 404(b) evidence, are reviewed for harmless error. *Denson*, 500 Mich at 409. "A preserved nonconstitutional error 'is presumed not to be a ground for reversal unless it affirmatively appears that, more probably than not, it was outcome determinative—i.e., that it undermined the reliability of the verdict.'" *Id.*, quoting *People v Douglas*, 496 Mich 557, 565-66 (2014). This Court "'focuses on the nature of the error and assesses its effect in light of the weight and strength of the untainted evidence.'" *People v Lukity*, 460 Mich 484, 492 (1999), quoting *People v Mateo*, 453 Mich 203, 215 (1996).

Importantly, "other-acts evidence carries with it a high risk of confusion and misuse." *Denson*, 500 Mich at 410, citing *Crawford*, 458 Mich at 398. "The risk is severe that the jury 'will use the evidence precisely for the purpose that it may not be considered, that is, as suggesting that the defendant is a bad person . . . and that if he did it before he probably did it again.'" *Denson*, 500 Mich at 410, quoting *Crawford*, 458 Mich at 398 (internal quotation marks omitted). The risk of the jury considering the evidence for an improper purpose is elevated when the prosecutor argues the propensity inference in closing argument such that "'the jury [cannot] escape the impermissible inference invited by this evidence.'" *Denson*, 500 Mich at 411-12, quoting *United States v Comanche*, 577 F3d 1261, 1269 (10th Cir. 2009).

In the instant matter, the improper admission of the MRE 404(b) evidence changed the entire dynamic of the trial. The entire trial was predominated by discussion of Mullins's past involvement with CPS. The People's key witness regarding Mullins's guilt of the offense was PD, who testified inconsistently at times. Ex. I at 151:14-153:21. The crux of the People's case rested on the jury giving considerable weight to the other-acts evidence, which included *inter alia* testimony that Mullins would not benefit from any additional parental programming—a de facto statement that Mullins was a bad person and parent. Ex. I at 282-87.

Most telling of all was the fact that the prosecutor argued extensively to the jury that Mullins had a propensity for getting CPS involved on purportedly false allegations. The closing arguments from the prosecutor in the instant matter are ostensibly more egregious than the statements made by the prosecutor in *Denson* that required vacation of the conviction and remand for a new trial. On at least 6 different occasions, the prosecutor argued or inferred that Mullins had lied to CPS before, so she was lying again. Ex. L at 16:17-24, 22:18-23:1, 28:6-8, 29:3-10, 90:22-91:13, 98:2-9, 100:14-22. The sum effect of this evidence "undermined the reliability of the verdict by making it more probable than

not that, had this evidence not been admitted, the result of the proceedings would have been different." *Denson*, 500 Mich at 413.

In conclusion, the trial court abused its discretion when it allowed the People to introduce its other acts evidence under MRE 404(b). The evidence was irrelevant and should have been excluded under MRE 402. Moreover, the People did not introduce the evidence for a proper purpose under MRE 404(b). Instead, the People used it for the purpose that is expressly prohibited under MRE 404(b). They used it to show that Mullins had engaged in this type of behavior before so she's probably doing the same thing again. Moreover, the other-acts evidence lacked the requisite "striking similarity" to the charged conduct required for it to be admitted. In addition, the other acts evidence—particularly the evidence regarding prior abuse and neglect petitions—was extremely prejudicial with very minimal permitted probative value, and the trial court abused its discretion when it refused to exclude the evidence under MRE 403. Based on the extremely prejudicial nature of the other acts evidence, admission of this evidence was not harmless error; reversal and remand for a new trial is warranted.

II. THE CRIME OF FILING A FALSE REPORT OF CHILD ABUSE OR NEGLECT ONLY APPLIES TO THOSE WHO QUALIFY AS MANDATORY REPORTERS OF CHILD ABUSE OR NEGLECT UNDER THE PLAIN MEANING OF THE STATUTE, AND MULLINS WAS NOT A MANDATORY REPORTER.

Mullins was charged and convicted by jury verdict of violating MCL 722.633(5)(b)(ii) for purportedly intentionally making a false report of felony child abuse or neglect knowing that the report was false. However, even assuming *arguendo* that the People's theory of the case is true, Mullins's actions would not constitute a violation of MCL 722.633(5)(b)(ii) because: (1) the plain language of the statute only criminalizes the act of intentionally and knowingly making a false report of child abuse or neglect by a mandatory reporter and Mullins was not a mandatory reporter, (2) the doctrine of innocent agent is inapplicable because Mullins could not be principally liable for the offense since

neither she nor PD is a mandatory reporter, and (3) Mullins could not be principally liable for the offense since neither she nor PD is a mandatory reporter.

This issue was preserved because the issue of whether Mullins could be charged under MCL 722.633(5)(b)(ii) was extensively argued by both parties throughout these proceedings. The district court originally refused to bind over Mullins on this offense, the People appealed, and the circuit court reversed. Moreover, Mullins maintained her innocence on this offense and was convicted by jury verdict after trial. Therefore, this issue is preserved for appeal. Issues of statutory interpretation are reviewed de novo. *Stanton v City of Battle Creek*, 466 Mich 611, 614 (2002).

MCL 722.633(5)(b)(ii) states:

> A person who intentionally makes a false report of child abuse or neglect under this act knowing that the report is false is guilty of a crime as follows:
>
> (b) If the child abuse or neglect reported would constitute a felony if the report were true, the person is guilty of a felony punishable by the lesser of the following:
>
> (ii) Imprisonment for not more than 4 years or a fine of not more than $2,000.00, or both.

Under the plain language of MCL 722.633(5)(b)(ii), only those making who intentionally make a false report "under this act" knowing that the report is false are guilty of a crime. MCL 722.633(5)(b)(ii) is part of the Child Protection Law. The child protection law establishes a system of mandatory reporters of child abuse or neglect. MCL 722.623(1). For example, physicians, psychologists, school administrators, and teachers "who ha[ve] reasonable cause to suspect child abuse or child neglect shall make an immediate report to centralized intake [of the DHHS] by telephone, or, if available, through the online reporting system, of the suspected child abuse or child neglect." MCL 722.623(1)(a); MCL 722.622(e), (p).

There is no evidence in the record to suggest that Mullins is a mandatory reporter under MCL 722.623(1). The only provision that could theoretically apply to Mullins is MCL 722.624. MCL 722.624 states, "In addition to those persons required to report child abuse or neglect under [MCL 722.623],

any person, including a child, who has reasonable cause to suspect child abuse or neglect may report the matter to [DHHS] or a law enforcement agency." Thus, MCL 722.624 provides a permissive option for those who are not mandatory reporters to report suspected child abuse or neglect.

A. The Statutory Language "Under this Act" of MCL 722.633(5) is Ambiguous as It Applies to Non-Mandatory Reporters and Cannot be Construed to Apply to Non-Mandatory Reporters Without Rendering the Term "Under this Act" Superfluous.

MCL 722.633(5) only criminalizes false reports that are intentionally made knowing that they are false "under this act." MCL 722.633 is part of the child protection law. MCL 722.621. Therefore, only reports that are made "under the child protection law" could potentially fall within the scope of MCL 722.633(5). The child protection law establishes two different types of reporters of suspected child abuse or neglect—mandatory and non-mandatory. MCL 722.623(1); MCL 722.624. The difference between reporters is straightforward. MCL 722.623(1) establishes that those in certain professions, occupations, or roles have a statutory mandate to report child abuse or neglect to DHHS. These individuals are "mandatory reporters." On the contrary, any person who does not meet the definition of a mandatory reporter is a "non-mandatory reporter" and is permitted—not required—to make a report of child abuse or neglect to DHHS or law enforcement. MCL 722.624.

The key differences between mandatory and non-mandatory reporters are: (1) mandatory reporters are required by statute to report suspected child abuse or neglect and (2) mandatory reporters can be held civilly and criminally liable for failing to report suspected child abuse or neglect. MCL 722.623(1); MCL 722.633(1), (2). Non-mandatory reporters have no obligation to report suspected child abuse or neglect and cannot be held civilly or criminally liable for failing to report suspected child abuse or neglect. *See* MCL 722.624; MCL 722.633(1), (2).

Since an essential requirement for criminal culpability MCL 722.633(5) is that the report must be made "under this act," i.e. under the child protection law, the meaning of "under this act" is unclear as it relates to non-mandatory reporters. Since mandatory reporters have an affirmative obligation to

report suspected child abuse or neglect, the term "under this act" in MCL 722.633(5) is clear in creating a situation where a mandatory reporter acts pursuant to the affirmative duties imposed under the child protection law. Therefore, when a mandatory reporter makes a report of suspected child abuse or neglect that they are required to make by statute, they are ostensibly acting "under this act" within the meaning of MCL 722.633(5). However, the meaning of "under this act" in MCL 722.633(5) is unclear and ambiguous as it relates to non-mandatory reporters, like Mullins and PD.

Since MCL 722.624 establishes that non-mandatory reporters are permitted but not required to report abuse, then one interpretation of "under this act" is that non-mandatory reporters are also acting "under this act" when they report suspected child abuse or neglect. However, under that interpretation, the language of "under this act" in MCL 722.633(5) becomes mere surplusage since the criminalized behavior would extend to every conceivable scenario where abuse or neglect is reported. There would be no need to include the language "under this act" in the statute if a reporter—mandatory or non-mandatory—is always acting under the child protection law when he or she makes a report to DHHS or law enforcement. The interpretation that non-mandatory reporters always act under the child protection law therefore runs contrary to well-established principles of statutory interpretation.

"[I]t is well established that in interpreting a statute we must avoid a construction that would render part of the statute surplusage or nugatory." *Robinson v City of Lansing*, 486 Mich 1, 21 (2010) (internal alterations omitted). If all reports of suspected child abuse or neglect fall under the scope of the child protection law, then the language of "under this act" in MCL 722.633(5) becomes surplusage or nugatory. It would be unnecessary and surplusage to define that only reports that are made "under the child protection law" fall within the scope of MCL 722.633(5) if every possible report of suspected child abuse or neglect falls under the child protection law.

The interpretation that MCL 722.633(5) does not create criminal liability for non-mandatory reporters is consistent when one considers the remaining provisions of MCL 722.633. Subsections 1 and 2 create civil and criminal liability for mandatory reporters who fail to report suspected child abuse or neglect. MCL 722.633(1), (2). Subsection 3 creates civil and criminal liability for unauthorized dissemination of information and records of child abuse or neglect that is contained in DHHS records. MCL 722.633(3). Subsection 4 establishes a criminal liability for failing to expunge a record of abuse or neglect, which would largely be applicable to mandatory reporters. MCL 722.633(4). As a result, nearly the entirety of MCL 722.633 concerns mandatory reporters or DHHS protocols and procedures.

Moreover, an interpretation that excludes non-mandatory reporters from criminal liability under MCL 722.633(5) is wholly consistent when one considers MCL 750.411a. MCL 750.411a(1) states in relevant part:

> [A] person who intentionally makes a false report of the commission of a crime, or intentionally causes a false report of the commission of a crime to be made, to a peace officer, police agency of this state or of a local unit of government, 9-1-1 operator, or any other governmental employee or contractor or employee of a contractor who is authorized to receive reports of a crime, knowing the report is false, is guilty of a crime as follows . . . .

As a result, when MCL 750.411a is considered with MCL 750.145, which establishes the crime of contributing to the neglect or delinquency of a minor child, and MCL 750.136b, which criminalizes child abuse, there is already a statutory scheme in place for potential criminal liability for a false report of child abuse or neglect. Therefore, it is consistent and logical to interpret MCL 722.633(5) such that it only establishes criminal culpability for mandatory reporters who intentionally make a false report of child abuse or neglect knowing that the report is false.

In the instant matter, Mullins is not a mandatory reporter. PD is not a mandatory reporter. Even assuming *arguendo* that all of the facts of the People's theory of the case are true, Mullins still would not be criminally culpable under MCL 722.633(5) because the statute cannot be interpreted to

apply to establish criminal culpability for non-mandatory reporters. Moreover, there is no evidence in the record to suggest that Linda Fish or Jody Maher knew that the report to DHHS was false. In fact, Ms. Fish and Ms. Maher testified that they did not do any investigation to determine whether the report was true or false. Ex. I at 183:9-11, 237:12-17. As a result, there was no factual evidence presented at Mullins's trial to suggest that any mandatory reporter had intentionally made a false report of child abuse or neglect knowing that the report was false. Therefore, Mullins's conviction for MCL 722.633(5) because her actions do not meet the requirements of the statute because Mullins was not acting "under the child protection law."

B. The People's Theory of Proceeding Under the Doctrine of Innocent Agent Must Also Fail Because Mullins Cannot be Held Criminal Culpable as a Principal under MCL 722.633(5).

The People argued extensively in the proceedings below that MCL 722.633(5) did not abrogate the common law doctrine of innocent agent and that they could proceed forward under that theory of the case. However, to hold a defendant culpable under the doctrine of innocent agent, the defendant must have principal liability for the offense. *People v Hack*, 219 Mich App 299, 303 (1996); *see also People v Kevorkian*, 447 Mich 436, 508 (1994) (Boyle, J., concurring in part and dissenting in part) ("However, at common law, one who does the deed, even through an innocent agent, is a principle in the first degree."). As previously noted, MCL 722.633(5) does not create criminal culpability for non-mandatory reporters, so Mullins cannot be held culpable as a principal for violation of MCL 722.633(5).

Hack is illustrative to the facts of the current matter. Hack videotaped "a three-year-old female victim who was forced to perform fellatio on her one-year-old-male cousin." *Hack*, 219 Mich App at 302. Hack argued unsuccessfully that he could not be guilty of first degree criminal sexual conduct as an aider and abettor because the participants were too young to be the principal to the offense. *Id.* at 303. The Court of Appeals rejected his argument because Hack himself was considered the principal—

not the participants. *Id.* The Court of Appeals held, "Where a defendant uses another person to accomplish a crime on his behalf, his guilty as a principal . . . . [I]n the case at bar, defendant's culpability is direct, not derivative." *Id.*

In the present matter, Mullins cannot be criminally culpable as the principal because MCL 722.633(5) does not apply to her since she is not a mandatory reporter. Therefore, the People's innocent agent theory of the case, while creative, cannot support a conviction under MCL 722.633(5).

C. Neither Mullins nor PD Can Have Principal Culpability Under MCL 722.633(5), so an Aiding and Abetting Theory of Culpability Must Also Fail.

This Court has established "three elements necessary for a conviction under an aiding and abetting theory: '(1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that the defendant gave aid and encouragement.'" *People v Robinson*, 475 Mich 1, 6 (2006), quoting *People v Moore*, 470 Mich 56, 67-68 (2004).

As to the second element, the *actus reus* element, "[i]t must be determined on a case-by-case basis whether the defendant 'performed acts or gave encouragement that assisted'" in the commission of the crime. *Moore*, 470 Mich at 71, quoting *People v Carines*, 460 Mich 750, 768 (1999)). To prove the third element, the *mens rea* element, the People have three options: they can prove: (A) "that the defendant intended to aid the charged offense," (B) that the defendant "knew the principal intended to commit the charged offense, or, alternatively, [(C)] that the charged offense was a natural and probable consequence of the commission of the intended offense." *Robinson*, 475 Mich at 15.

In the present matter, the aiding and abetting theory fails on the first element. Neither Mullins nor PD can be held liable as a principal for violation of MCL 722.633(5). Furthermore, there is no evidence in the record that either Ms. Fish or Ms. Maher knew that the report to DHHS was false when they made it. In fact, the evidence in the record supports that neither Ms. Fish or Ms. Maher

had any belief as to the truthfulness of the allegations contained in the report and that they deferred to DHHS to investigate the truthfulness of the allegations. Therefore, Mullins could not be convicted under an aiding and abetting theory of the case either.

In sum, MCL 722.633(5) only establishes criminal culpability for those who intentionally make a false report of child abuse or neglect knowing that the report is false, while acting "under the child protection law." Only mandatory reporters have affirmative obligations to report suspected child abuse or neglect under the child protection law. MCL 722.623(1). Non-mandatory reporters are permitted—but not required—to make reports of suspected child abuse or neglect under the child protection law. MCL 722.624. Extending criminal culpability under MCL 722.633(5) to both mandatory and non-mandatory reporters renders the meaning of "under this act" to be surplusage or nugatory because there would be no actions that would fall outside the scope of the child protection law. Therefore, the only consistent interpretation of "under this act" is that MCL 722.633(5) applies only to those with affirmative obligations under the child protection law—mandatory reporters. As a result, neither Mullins nor PD could be held criminally culpable as a principal for violating MCL 722.633(5).

In conclusion, Mullins could not be charged or convicted of MCL 722.633(5), and her conviction on that offense must be vacated. Furthermore, Mullins's conviction of MCL 750.145 must also be vacated because MCL 750.145 is a misdemeanor offense that should have remained in the jurisdiction of the district court as opposed to the circuit court. As this matter should have never proceeded to the circuit court for trial, Mullins's conviction for MCL 750.145 must also be reversed and remanded for a new trial.

RELIEF REQUESTED

WHEREFORE Defendant-Appellant Shae Lynn Mullins respectfully requests that this Court vacate Defendant-Appellant's convictions and reverse and remand this matter for a new trial.

Respectfully Submitted,

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/s/ John W. Fraser

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